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No. 05-1284

IN THE

Supreme Court of the United States

LISA WATSON, ET AL.,

Petitioners,

v.

PHILIP MORRIS COMPANIES, INC., ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

The Federal Trade Commission requires that the tar and nicotine smoke yields of cigarettes be tested using a single method. The FTC performed the testing itself for 20 years, and then delegated the testing function to the major members of the tobacco industry. Respondent and others perform those tests under the supervision, direction, and control of the FTC, which reports the results to Congress and the public, requires respondent to disclose the test results in its advertising, and permits respondent to use terms such as "light" to describe the test results. The question presented is whether respondent is thereby "acting under" a federal officer or agency within the meaning of 28 U.S.C. § 1442(a)(1), such that state-law claims directly challenging the federally mandated testing and disclosure regime can be removed to federal court.

RULE 29.6 STATEMENT

The corporate disclosure statement included in the brief in opposition to the petition for a writ of certiorari remains accurate.

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BRIEF FOR RESPONDENTS

Respondent Philip Morris USA Inc. (PMUSA) respectfully submits that the judgment of the court of appeals should be affirmed.

STATEMENT

Petitioners filed this putative class action in Arkansas state court, alleging that PMUSA's marketing of Cambridge Lights and Marlboro Lights cigarettes violated an Arkansas consumer protection law. At the heart of petitioners' complaint is a challenge to the testing system mandated by the Federal Trade Commission (FTC) for measuring and disclosing tar and nicotine smoke yields for all cigarettes. Because PMUSA engages in the challenged conduct on behalf of and at the direction of the FTC, PMUSA removed the action to federal court pursuant to 28 U.S.C. § 1442(a)(1), which authorizes removal by private persons "acting under" federal officers and agencies. The district court denied petitioners' motion to remand and, on interlocutory appeal, the court of appeals affirmed.

A. Factual Averments

1. Petitioners allege that PMUSA's representations that its Cambridge Lights and Marlboro Lights cigarettes "are 'lighter' (i.e., lower [in] tar and nicotine) than regular cigarettes are deceptive and misleading" under Arkansas law. Pet. App. 64a. Although styled as a challenge to PMUSA's marketing of "light" cigarettes, petitioners' state-law claims are ultimately premised on the theory that the "testing apparatus" that the federal government requires tobacco companies to use in measuring tar and nicotine yields—and upon which descriptors such as "light" are based—fails to reflect actual tar and nicotine deliveries to smokers. *Id.* at 63a. According to petitioners, consumers of Marlboro Lights and Cambridge Lights "receive higher levels of tar and nicotine than the testing apparatus registers" because individuals

smoke cigarettes with lower yields of tar and nicotine more intensely to compensate for the lower yields. *Id.* at 64a. Petitioners further allege that PMUSA "designed Cambridge Lights and Marlboro Lights to register lower levels of tar and nicotine on the testing apparatus . . . than would be delivered to the consumers of the product." *Id.* at 63a-64a. Petitioners claim that PMUSA "controlled the tar and nicotine delivery of Cambridge Lights and Marlboro Lights cigarettes under machine testing conditions apparently to achieve support for [its] representations that [its] . . . cigarettes are 'light' and contain decreased tar and nicotine." *Id.* at 64a. On behalf of a putative class, petitioners are seeking unspecified compensatory and punitive damages. *Id.* at 71a, 73a.

2. Federal law authorizes removal of state-court actions against "any officer (or any person acting under that officer) of the United States or of any agency thereof, . . . for any act under color of such office." 28 U.S.C. § 1442(a)(1). PMUSA invoked this provision because petitioners' claims directly challenge the results of the FTC's testing methodology, and because, by carrying out the tar and nicotine testing and disclosure of which petitioners complain, PMUSA was both assisting the FTC in performing its regulatory functions and acting at the direction of the FTC.

As this Court has explained, "in all cases of removal from the state courts, the jurisdiction of the [federal courts] rests and depends upon the statements made in the petition for removal." *Virginia* v. *Paul*, 148 U.S. 107, 122 (1893). Petitioners did not dispute the factual averments in PMUSA's Notice of Removal (*see* Pet. App. 58a); those averments are therefore to be taken as true in determining whether the prerequisites to Section 1442(a)(1) removal exist in this case. *Colorado* v. *Symes*, 286 U.S. 510, 515 (1932) ("As the [party opposing removal] did not join issue with any of the allegations of the petition for removal, the jurisdiction of the federal court and the validity of its action [in denying the motion to remand] are to be determined upon the allega-

tions of the petition"). The following statement summarizes the Notice of Removal (Pet. App. 74a-97a) and its supporting documentation.

a. Congress has placed significant restrictions on the tobacco industry's marketing activities, including through the enactment of the Federal Cigarette Labeling and Advertising Act (FCLAA). "[T]o the extent that Congress contemplated additional targeted regulation of cigarette advertising, it vested that authority in the FTC" (*Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 548 (2001)), which possesses authority under Section 5 of the Federal Trade Commission Act (FTCA) to prevent unfair or deceptive trade practices. 15 U.S.C. § 45(a)(1); *see also id.* § 1336; Pet. App. 78a. For more than fifty years, the FTC has repeatedly brought that regulatory authority to bear on the tobacco industry, most frequently with regard to tobacco companies' advertising and promotional statements about the tar and nicotine yields of their cigarettes.

The FTC has long sought to ensure that consumers are provided standardized information about the tar and nicotine yields of cigarettes that they can consider in making their brand choices. Pet. App. 78a. Because the various tobacco companies initially used different testing methods to substantiate their tar and nicotine advertising claims, it was impossible for consumers to draw meaningful interbrand comparisons, and in 1959, the FTC directed the tobacco industry to cease making all tar and nicotine claims, upon pain of an enforcement action for engaging in deceptive trade practices. Pet. App. 79a; J.A. 12.

In 1964, the Surgeon General issued a report that concluded that smoking causes lung cancer. J.A. 76. The report prompted the public-health community to begin an intensive inquiry into possible means of reducing the risks associated with smoking. The FTC strongly supported that effort. *See* 29 Fed. Reg. 530, 532 (Jan. 22, 1964) ("it is the Federal

Trade Commission's policy to encourage the development of less hazardous cigarettes").

Two years later, the U.S. Public Health Service issued a report concluding that the "preponderance of scientific evidence strongly suggests that the lower the 'tar' and nicotine content of cigarette smoke, the less harmful would be the effect." J.A. 25; *see also* Pet. App. 79a. In transmitting the report to Congress, the Secretary of Health, Education, and Welfare suggested that "requiring the identification of 'tar' and nicotine levels on packages and in advertising . . . would be an important step and would result in the progressive reduction of 'tar' and nicotine levels because of public demand." J.A. 23. Public-health organizations made similar recommendations to the FTC. Pet. App. 79a. The American Cancer Society, for example, wrote to "express the conviction . . . that the Federal Trade Commission can render a major service to the health of the public by rescinding its restriction relative to the mention of tar and nicotine content of cigarette smoke in cigarette advertising." Resp. C.A. App. 14; *see also ibid.* ("The National Interagency Council on Smoking and Health hopes that [the FTC] will take the steps necessary to make it permissible for cigarette manufacturers to list tar and nicotine content on the labels of cigarette packages").

The FTC's response was immediate. To "augment information available to the public on the tar and nicotine content of cigarettes" and "prompt cigarette manufacturers to develop less hazardous cigarettes" (J.A. 15), the FTC in 1966 lifted its prohibition on the advertising of tar and nicotine yields (*id.* at 20). In an effort to facilitate consumers' interbrand comparisons of tar and nicotine yields, the FTC provided that only statements substantiated by testing under the "Cambridge Filter Method" (*id.* at 21), a technique for measuring a cigarette's tar and nicotine yields that later became known as the "FTC Method" (*id.* at 76), would be permitted. Pet. App. 79a. The FTC explained that it "favor[ed] giving

smokers as much information about the risks involved in smoking as is possible and to that end favor[ed] mandatory disclosure of tar and nicotine content, as measured by a standard test." J.A. 59 (internal quotation marks omitted); *see also id.* at 21; Pet. App. 79a-80a.

The FTC Method measures the tar and nicotine yields of a cigarette's smoke using a machine that takes a two-second puff on a cigarette every minute down to a specified butt length. Pet. App. 81a. The tar and nicotine emitted from the cigarette are collected and measured by the machine, and an average tar and nicotine rating is calculated based on a sample of 100 cigarettes. *Ibid.*[1]

Shortly after designating the FTC Method as the exclusive means for computing tar and nicotine yields disclosed in advertising, the FTC held public hearings concerning possible modifications to the test's procedures. 31 Fed. Reg. 14,278 (Nov. 4, 1966); J.A. 27. During the hearings, Dr. Clyde Ogg, the Department of Agriculture employee who was the principal developer of the FTC Method, emphasized that "[s]ince smokers vary so greatly in their smoking habits, the [FTC] Method will not tell a smoker how much tar and

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[1] The FTC specified detailed requirements for conducting the test:

> 1. Smoke cigarettes to a 23 mm. butt length, or to the length of the filter and overwrap plus 3 mm. if in excess of 23 mm.,
>
> 2. Base results on a test of 100 cigarettes per brand, or type,
>
> 3. Cigarettes to be tested will be selected on a random basis, as opposed to "weight selection,"
>
> 4. Determine particulate matter on a "dry" basis . . . to determine the moisture content,
>
> 5. Determine and report the "tar" content after subtracting moisture and alkaloids (as nicotine) from particulate matter,
>
> 6. Report tar content to the nearest whole milligram and nicotine content to the nearest 1/10 milligrams.

32 Fed. Reg. 11,178, 11,178 (Aug. 1, 1967); J.A. 46.

nicotine he will get from any given cigarette." Resp. C.A. App. 98. Dr. Ogg explained that the FTC Method "will indicate, however, whether [a smoker] will get more from one than from another cigarette if there is a significant difference between the two and if he smokes the two in the same manner." *Ibid.* PMUSA and other tobacco companies submitted written comments that similarly explained that the FTC Method did not approximate human smoking behavior. J.A. 31-32 ("The [FTC] Method does *not* measure the *volume* of smoke—or the [particulate matter] or nicotine in the volume of smoke—that any *human being* will draw from smoking any particular cigarette") (emphases in original).

The FTC decided to retain the FTC Method as the exclusive means for measuring tar and nicotine yields, despite its knowledge that the methodology did not approximate actual smoking behavior. The FTC explained that "[n]o test can precisely duplicate conditions of actual human smoking." J.A. 53. "[T]he purpose of testing," the FTC continued, "is not to determine the amount of tar and nicotine inhaled by any human smoker, but rather to determine the amount of tar and nicotine generated when a cigarette is smoked by machine in accordance with the prescribed method." *Id.* at 54; *see also id.* at 53 ("The [FTC] considers it most important that the test results be based on a reasonable standardized method and that they be capable of being presented to the public in a manner that is readily understandable").

b. In 1967, as part of its effort to provide standardized tar and nicotine ratings to consumers, the FTC took the "highly unusual" step of opening its own laboratory to perform testing on the tar and nicotine yields of cigarettes. J.A. 85; *see also* Pet. App. 81a. Never before had the FTC involved itself so directly in an industry, and it has not done so again since. *See* J.A. 260 (the "operation of the cigarette lab was really something that was unique") (statement of C. Lee Peeler, Deputy Director, FTC Bureau of Consumer Protection); Pet. App. 82a.

Notwithstanding the known limitations inherent in the FTC Method, the FTC adopted that methodology because, the FTC later explained, "the [testing] numbers provide legitimate comparative information to consumers attempting to lower their overall tar and nicotine consumption." Resp. C.A. App. 392. The FTC periodically published the results of its tar and nicotine tests in the *Federal Register* and also included the results in annual reports to Congress. Pet. App. 82a.

In 1987, the FTC closed its testing laboratory due to cost considerations, and delegated responsibility for testing to the Tobacco Institute Testing Laboratory (TITL), which is funded by the major participants in the tobacco industry and continues to this day to conduct tar and nicotine testing using the FTC Method. Pet. App. 82a-83a. "The methodology, processes and procedures that the . . . TITL employ[s] are identical to those the Commission . . . followed in the past." 55 Fed. Reg. 42,768, 42,768 (Oct. 23, 1990). The FTC obtains the results of that testing from the individual tobacco companies and publishes the results in the *Federal Register* and in annual reports to Congress. Pet. App. 83a; J.A. 48. The TITL performs its testing "under the supervision of a representative of the FTC" (55 Fed. Reg. at 42,768), who has unrestricted access to the laboratory to ensure that the testing is being conducted in accordance with the detailed specifications of the FTC Method. Pet. App. 83a; J.A. 86.

c. In the years immediately following the FTC's decision to lift the prohibition on the disclosure of tar and nicotine yields, relatively few tobacco companies voluntarily disclosed tar and nicotine yields in their advertising. As part of its effort to encourage consumers to rely on the FTC Method results in making their brand choices and to facilitate the development of cigarettes with lower tar and nicotine yields, the FTC in 1970 proposed a Trade Regulation Rule that would have made it an unfair or deceptive practice under Section 5 of the FTCA for tobacco companies not to disclose

tar and nicotine yields in their advertising. Pet. App. 85a. This proposal had the strong support of the public-health community. Resp. C.A. App. 16.

At the FTC's invitation, the leading tobacco companies, including PMUSA, submitted a proposed agreement to the FTC that required disclosure of FTC-measured tar and nicotine yields in all advertisements. Pet. App. 85a. The FTC sought an industry agreement from the major cigarette manufacturers because, in the words of then-Chairman Miles W. Kirkpatrick: "The Commission's objective is to insure that all cigarette advertising make[s] these tar and nicotine disclosures as soon as possible. . . . A trade regulation rule, if contested in the courts, might take a long time to become effective; a workable, voluntary plan by the industry could be put into effect immediately." J.A. 145; *see also id.* at 147 ("The Commission believes that if the [industry agreement] operates satisfactorily, the public will, at the earliest possible time, be informed of the tar and nicotine content of cigarettes"); Pet. App. 86a.

Despite the FTC's desire to secure the mandatory disclosure of tar and nicotine yields as quickly as possible, the FTC rejected the tobacco industry's initial proposal as inadequate. J.A. 159. The major tobacco companies thereafter submitted a revised version of the agreement that included modifications to meet the FTC's specific requirements. *Id.* at 160. After subjecting the revised agreement to public comment, the FTC accepted the agreement and terminated its rulemaking proceedings, while reserving the right to reinstitute those proceedings in the event of industry noncompliance. 36 Fed. Reg. 784 (Jan. 16, 1971); J.A. 146.

Since the disclosure agreement went into effect in 1970, the FTC has strictly policed its terms and ensured that the major tobacco companies' cigarette advertisements disclose

tar and nicotine yields, as calculated using the FTC Method.[2] Indeed, the FTC has emphasized that the "public interest requires that all test results presented to the public be based on a uniform method" because "[u]se of more than one testing method would . . . only serve to confuse or mislead the public." J.A. 53. To that end, the FTC issued an advisory opinion that instructed a tobacco company that "it would be deceptive to advertise a tar figure which is *higher* than the latest applicable FTC tar figure." *In re Lorillard*, 92 F.T.C. 1035, 1035 (1978) (emphasis added); *see also* J.A. 202. The FTC cautioned that "[i]f the headlined tar level [in an advertisement] differs from the tar figure disclosed in accordance with the cigarette industry's voluntary disclosure agreement, consumer confusion might be generated." *Lorillard*, 92 F.T.C. at 1035; *see also* J.A. 202. "[T]ar values which are set forth in cigarette advertisements," the FTC emphasized, "must be consistent with the latest applicable FTC tar number." *Lorillard*, 92 F.T.C. at 1036; *see also* J.A. 202.[3]

Similarly, when another tobacco company began including testing results from an independent laboratory in its advertisements for a uniquely designed cigarette, the Barclay brand, that could not be accurately tested using the FTC Method, the FTC initiated an enforcement action against the company. *See FTC* v. *Brown & Williamson Tobacco Corp.*, 778 F.2d 35 (D.C. Cir. 1985). The suit alleged that the defendant's use of results generated by a means other than the FTC Method was deceptive, and culminated in a holding that the advertisements violated Section 5 of the FTCA. *Id.* at 43.

The FTC has also repeatedly reevaluated the propriety of its tar and nicotine testing procedures and studied whether

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[2] The agreement required tobacco advertising to bear the legend "_ mg. 'tar', _ mg. nicotine av. per cigarette, FTC Report (date)." J.A. 167.

[3] The FTC is bound by its advisory opinions. *See* 16 C.F.R. §§ 1.1, 1.3.

the FTC Method should be replaced by an alternative testing procedure. Pet. App. 83a. In so doing, it has considered at length the same methodological limitation—the FTC Method's inability to replicate the variability of human smoking behavior and account for the tendency of some consumers to smoke "light" cigarettes more intensely to compensate for lower nicotine yields—that forms the basis for petitioners' claims. For example, in the early 1980s, the FTC undertook a multiyear review of its testing methodology and solicited public comments about whether the test should be modified in light of compensatory smoking behavior to reflect more accurately smokers' actual tar and nicotine intake. 48 Fed. Reg. 15,953 (Apr. 13, 1983); J.A. 129. Similarly, in 1997, the FTC initiated a still-ongoing inquiry into whether the FTC Method should be modified or abandoned altogether. 62 Fed. Reg. 48,158, 48,158 (Sept. 12, 1997). To date, the FTC has elected to retain the FTC Method, despite its known methodological limitations, because epidemiological evidence has suggested that lower FTC-measured tar and nicotine yields are associated with reduced health risks (J.A. 85), and because the FTC Method provides consumers with a meaningful tool for making interbrand comparisons regarding tar and nicotine yields. *See* 62 Fed. Reg. at 48,158 ("The purpose of the [testing] program was to provide smokers seeking to switch to lower tar cigarettes with a single, standardized measurement with which to choose among the existing brands"); *see also* Pet. App. 80a-81a.

d. A number of tobacco companies, including PMUSA, use descriptors—such as "low tar," "lowered tar and nicotine," and "light"—in their marketing. The descriptors reflect the results of testing under the FTC Method and signal to consumers that certain brands have lower tar and nicotine yields under the FTC Method than other brands. The FTC has repeatedly endorsed the use of descriptors and has repeatedly defined the term "low tar" in its annual reports to Congress as denoting 15.0 milligrams or less of tar. *See* J.A.

210 n.8 ("The FTC has not defined . . . any term related to 'tar' level except for 'low tar,' which the FTC defines as 15.0 mg. or less tar"); *id.* at 213 n.11 (same); Pet. App. 86a-87a.

In 1967, just two months after beginning testing with the FTC Method, the FTC issued a policy statement explaining that it "would not challenge statements or representations of or relating to tar and nicotine content of cigarettes where they are shown to be accurately and fully substantiated by tests conducted in accordance with the standardized testing methods and procedures used by the" FTC. J.A. 15-16 (internal quotation marks omitted); *see also id.* at 59. The FTC repeated this policy statement in its 1968 annual report to Congress. *Id.* at 15-16.

Subsequently, through a series of consent agreements with individual tobacco companies, the FTC reaffirmed that tar and nicotine descriptors may be used to encapsulate the results of the FTC Method. Pet. App. 87a. In 1971, the FTC entered into a consent order with American Brands that permitted the company to state "in advertising that any cigarette manufactured by it, or the smoke therefrom, is low or lower in 'tar' by use of the words 'low,' 'lower,' or 'reduced' or like qualifying terms," so long as "the statement is accompanied by a clear and conspicuous disclosure" of tar and nicotine yields, as measured by the FTC Method. *In re Am. Brands, Inc.*, 79 F.T.C. 255, 257 (1971); J.A. 203; *see also* Pet. App. 87a. Similarly, in 1995, the FTC entered into a consent order with the American Tobacco Company prohibiting it from making comparative claims about smokers' actual intake of tar and nicotine, while expressly providing that the company could use descriptive terms such as "low," "lower," and "lowest," in conjunction with tar and nicotine yields un-

der the FTC Method. 59 Fed. Reg. 51,980, 51,981 (Oct. 13, 1994); J.A. 219; Pet. App. 87a.[4]

Against this backdrop, PMUSA introduced Marlboro Lights in 1971 and Cambridge Lights in 1986, and marketed its Marlboro Lights as having "lowered tar and nicotine." Both brands have always had less than 15 milligrams of tar, as measured by the FTC Method; their packaging has always borne the FCLAA-mandated health warning labels; and their advertising has always included the FTC-required legend disclosing tar and nicotine yields under the FTC Method.

B. Rulings Below

Petitioners moved to remand the action to state court. In their motion, petitioners acknowledged that PMUSA "asserts that it committed the acts complained of in the Complaint on behalf of and at the direction of the United States government." Pet. C.A. App. 64. In their supporting memorandum (at 2), petitioners labeled PMUSA's extensive factual averments "fascinating, but ultimately irrelevant." Neither in the motion nor in the memorandum did petitioners dispute *any* of the factual averments in the Notice of Removal or introduce any evidence to the contrary. Indeed, they acknowledged that there was an "undisputed factual record." Pet. for Interlocutory Appeal 4. Accordingly, the averments in the Notice of Removal are taken to be both true and controlling for purposes of evaluating the propriety of removal. *See Symes*, 286 U.S. at 515.

1. The district court denied petitioners' motion to remand. Observing that the "facts surrounding the FTC's involvement with cigarette testing and advertising are not in dispute" (Pet. App. 58a), the district court surveyed the regulatory history at length, explaining that "[i]n addition to

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[4] Consistent with the FTC's policy for all consent decrees, these decrees were published for public notice and comment before being finalized. 16 C.F.R. § 2.34.

mandating the disclosure of tar and nicotine values under the FTC Method in all cigarette advertising, the FTC permits a manufacturer to advertise a cigarette as 'low tar' or 'light' if a cigarette's tar value under the FTC Method is 15.0 mg or less." Pet. App. 29a. Indeed, "the FTC has . . . expressed its view that cigarette companies engage in deceptive advertising . . . when they advertise cigarettes as 'light' or 'low tar' *without* publishing [FTC] Method test results" to substantiate such statements. *Ibid.* (emphasis added). The FTC also "inspect[s] the TITL testing facility, compel[s] cigarette manufacturers to disclose tar and nicotine ratings for all cigarettes both to the FTC and in all advertisements, and publish[es] tar and nicotine figures in the Federal Register." *Id.* at 34a.

The district court "conclude[d] that [PMUSA] acted under the direction of a federal officer within the meaning of § 1442(a)(1) when it cited the tar and nicotine values derived from the FTC Method in its Marlboro Light and Cambridge Light advertisements." Pet. App. 41a. "The FTC has repeatedly examined the very inaccuracies in the FTC Method that form the basis for [petitioners'] claims of deceptive advertising," the court continued, but "the FTC continues to this day to mandate use of the FTC Method for testing and advertising." *Id.* at 43a. Petitioners' "claim[] that [PMUSA's] advertisements are deceptive," the district court concluded, "necessarily calls into question the FTC's regulation of those advertisements." *Id.* at 44a.

2. The Eighth Circuit accepted petitioners' interlocutory appeal and affirmed. The court noted that "Section 1442(a) requires that a defendant: (1) act under the direction of a federal officer; (2) show a nexus or 'causal connection' between the alleged conduct and the official authority; [and] (3) have a colorable federal defense." Pet. App. 4a. The court deter-

mined that each requirement was met on the undisputed facts averred in the Notice of Removal.[5]

With respect to the first requirement, the court of appeals explained that "[w]hether a defendant is 'acting under' the direction of a federal officer depends on the detail and specificity of the federal direction of the defendant's activities and whether the government exercises control over the defendant." Pet. App. 6a. "Mere participation in a regulated industry," the court emphasized, "is insufficient to support removal." *Ibid.* The court determined that much more was involved than ordinary regulation:

> Here, the FTC controls the delivery of tar and nicotine information to consumers. . . . [T]he FTC itself conducted the entire testing process for twenty years and now requires the cigarette manufacturers to conduct the testing to its specifications. The FTC continues to inspect the industry labs, independently verify the results, and publish the ratings.

Id. at 9a. The FTC also "compelled the tobacco companies to adhere to a testing and advertising standard that was prompted by the FTC." *Id.* at 10a. Indeed, "[t]he FTC involved itself in the tobacco industry to an unprecedented extent," *id.* at 13a, leaving the court of appeals "convinced that the record in this case shows a level of compulsion that establishes that [PMUSA] was indeed 'acting under' the direction of a federal officer." *Id.* at 10a.

The court of appeals also concluded that there was a "causal nexus" between the FTC's direction and the acts challenged by petitioners. Pet. App. 14a. As the court ex-

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[5] The court noted a fourth requirement—that the defendant be a "person"—that it found satisfied. Pet. App. 17a-18a; *see also id.* at 35a (petitioners "do not dispute that both of the Defendant corporations are 'persons' within the meaning of § 1442(a)(1)") (both citing *Ryan* v. *Dow Chem. Co.*, 781 F. Supp. 934 (E.D.N.Y. 1992)); note 8, *infra*.

plained, by challenging the use of "low tar descriptors such as 'lights' or 'lowered tar,'" petitioners "claim it is deceptive for [PMUSA] to use a low tar descriptor in conjunction with its cigarettes' FTC ratings." *Id.* at 14a-15a. The court recognized, however, that the FTC had determined that this conduct was not deceptive: "[t]he very combination [petitioners] challenge as deceptive is the same combination the FTC requires to *not* be deceptive." *Id.* at 15a (emphasis in original). Accordingly, "[w]hether [PMUSA]'s labeling of cigarettes as 'lights' is deceptive directly implicates the enforcement and wisdom of the FTC's tobacco policies" (*ibid.*), and petitioners' "claims are sufficiently related to the FTC's direct and comprehensive control to establish a causal connection." *Id.* at 16a.

Finally, although petitioners did not dispute the issue, the court of appeals considered whether PMUSA's federal preemption defense was "colorable." The court had "no hesitation in concluding that [PMUSA], in its Notice of Removal, has set forth a colorable federal defense." Pet. App. 17a.

Judge Gruender, who "fully concur[red] in the court's opinion and judgment," wrote separately "to emphasize that [the Eighth Circuit's decision] should not be construed as an invitation to every participant in a heavily regulated industry to claim that it, like [PMUSA], acts at the direction of a federal officer merely because it tests or markets its products in accord with federal regulations." Pet. App. 18a. "In this case, as the court's opinion makes clear, the FTC's direction and control of the testing and marketing practices at issue is extraordinary." *Ibid.* "Because the FTC passed the function of performing the testing to the cigarette companies while allowing them no independent control of the process whatsoever," Judge Gruender concluded, "this is a rare case in which federal officer jurisdiction is appropriate." *Ibid.*

SUMMARY OF ARGUMENT

The undisputed averments in PMUSA's Notice of Removal establish that petitioners' state-court action was properly removed by PMUSA pursuant to 28 U.S.C. § 1442(a)(1) under either the "assisting" standard endorsed by petitioners and the Solicitor General or the "direction and control" standard applied by the court of appeals.

A. Since its earliest iteration in 1815, the federal officer removal statute has authorized federal officers, and private parties acting on behalf or at the direction of federal officers, to remove cases to federal court. The statute provides a federal forum for federal officers and those acting under them in order to prevent state courts from impeding the implementation of federal policies. The current version of the statute authorizes removal by "[t]he United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office." 28 U.S.C. § 1442(a)(1).

1. Petitioners and the Solicitor General contend that a person is "acting under" a federal officer only when that person assists or acts on behalf of a federal officer in the performance of the officer's official duties. Although that interpretation of Section 1442(a)(1) is too narrow, PMUSA's conduct would fall within the scope of the removal statute even if the standard advanced by petitioners and the Solicitor General were correct.

a. It is well-established that the federal officer removal statute is at least broad enough to encompass private persons who assist federal officers in discharging their official responsibilities. The Court has explained that "the protection which the [removal] law . . . furnishes to the [officer], also shields all who lawfully assist him in the performance of his official duty." *Davis* v. *South Carolina*, 107 U.S. 597, 600 (1883).

b. Under the undisputed averments of the Notice of Removal, PMUSA assists and acts on behalf of the FTC by conducting the official tar and nicotine testing program that the FTC itself carried out for twenty years. The FTC took the highly unusual step of opening its own cigarette testing facility in 1967 to ensure that consumers were provided with reliable, standardized data regarding the tar and nicotine yields of cigarettes. When cost considerations caused the FTC to close its facility, it delegated testing responsibility to PMUSA and the other major tobacco companies. The FTC specifies the testing procedure to be used at the industry laboratory and retains the unrestricted right to inspect the facility to ensure that its detailed testing requirements are being followed. The FTC obtains the testing results from PMUSA and publishes the results as official government data in the *Federal Register* and in reports to Congress; it also requires PMUSA to disclose the testing results in its advertising, and authorizes PMUSA to use descriptors such as "light" when those claims are substantiated by the testing results. PMUSA thereby assists the FTC in carrying out its official functions of testing the tar and nicotine yields of cigarettes and providing consumers with standardized tar and nicotine information that can be used in making brand choices. By performing the official testing program on the FTC's behalf, PMUSA "act[s] under" the FTC.

2. In any event, the standard endorsed by petitioners and the Solicitor General is unduly narrow. This Court has never limited the federal officer removal statute solely to private persons who assist or act on behalf of a federal officer. As the court of appeals recognized, removal is also available to private persons who act under a federal officer's direction and control.

a. To "act[] under" means to act "'subject to the authority, direction, or supervision'" of another. Pet. Br. 12 (quoting RANDOM HOUSE UNABRIDGED DICTIONARY 2059 (2d ed. 1993)). Petitioners point to Section 1442(a)(1)'s "color of

". . . office" requirement in an attempt to limit the definition of "acting under" to private persons who are exercising "official authority." This Court, however, has already authoritatively defined the "color of . . . office" language as requiring a "'causal connection' between the charged conduct and asserted official authority." *Willingham* v. *Morgan*, 395 U.S. 402, 409 (1969). The provision therefore distinguishes between conduct a private person performs at the direction of a federal officer (which is a basis for removal) and conduct the private person undertakes independently of the federal officer (which is not a basis for removal). The language does not impose an official authority requirement.

b. PMUSA is subject to the FTC's direction and control in testing and disclosing the tar and nicotine yields of cigarettes. As set forth in PMUSA's Notice of Removal, the FTC has exercised uniquely detailed regulatory control over the tobacco industry: It initially banned all references to tar and nicotine yields in advertising, then reversed course and authorized such disclosures when substantiated by the FTC Method, and finally—through its 1970 agreement with the tobacco industry—compelled PMUSA and the other major tobacco companies to disclose FTC Method tar and nicotine yields in all advertising. The FTC performed the tar and nicotine testing itself for twenty years, before delegating the responsibility to the tobacco industry, subject to pervasive FTC supervision. The FTC has authorized PMUSA to use descriptors such as "light" and "low tar" only if they are substantiated by the results of testing under the FTC Method. The efforts of petitioners and the Solicitor General to rewrite the history of tobacco regulation disregard the controlling averments in PMUSA's Notice of Removal and the consistent factual findings of both lower courts.

3. Although petitioners and the Solicitor General suggest that authorizing PMUSA to remove would result in a flood of removals by regulated industries, that suggestion is contradicted by the unique history of federal tobacco regula-

tion. Although many industries may be subject to federal testing requirements, it is exceedingly rare for the federal government to delegate to an industry the responsibility for carrying out official testing that the federal government itself previously performed. Authorizing removal in this unique regulatory setting would not extend Section 1442(a)(1) to participants in other regulated industries.

B. In this Court, petitioners do not dispute that their claims relate to "act[s] under color of . . . office." As the court below correctly recognized, the "causal nexus" requirement is met because petitioners' lawsuit is a direct attack upon the federal government's national tobacco policy and the testing methodology that the FTC has prescribed for determining and disclosing tar and nicotine yields.

Petitioners allege that PMUSA's use of "light" descriptors is deceptive because smokers do not receive lower levels of tar and nicotine compared to other brands, as is indicated by the FTC Method. The FTC, however, has mandated that the major tobacco companies use that testing methodology as the exclusive means of calculating tar and nicotine yields—despite the test's known inability to measure actual smokers' tar and nicotine intake—and has authorized the tobacco industry to use descriptors to reflect the results of the FTC Method. Because petitioners' suit attempts to second-guess the FTC's regulatory decision-making, it should be heard in a federal forum to ensure that state courts do not sit in judgment over the federal government's tobacco policy.

C. Petitioners do not dispute that PMUSA has a colorable federal preemption defense. *See, e.g., Brown* v. *Brown & Williamson Tobacco Corp.*, ___ F.3d ___, 2007 WL 470406 (5th Cir. 2007). The validity of that defense, of course, is a question for the district court to address in the first instance.

ARGUMENT

"[T]his Court has held that the right of removal is absolute for conduct performed under color of federal office, and has insisted that the policy favoring removal 'should not be frustrated by a narrow, grudging interpretation of § 1442(a)(1).'" *Arizona* v. *Manypenny*, 451 U.S. 232, 242 (1981) (quoting *Willingham* v. *Morgan*, 395 U.S. 402, 407 (1969)). As the Court has explained:

> The various acts of Congress constituting the section as it now stands were enacted to maintain the supremacy of the laws of the United States by safeguarding officers *and others* acting under federal authority against peril of punishment for violation of state law or obstruction or embarrassment by reason of opposing policy on the part of those exerting or controlling state power.

Colorado v. *Symes*, 286 U.S. 510, 517 (1932) (emphasis added). "It scarcely need be said," the Court continued, "that such measures are to be liberally construed to give full effect to the purposes for which they were enacted." *Ibid.*; *see also Willingham*, 395 U.S. at 406 ("The federal officer removal statute is not 'narrow' or 'limited'").[6]

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[6] Notwithstanding this Court's repeated holdings that Section 1442(a)(1) "is not 'narrow,'" petitioners twice refer to it as "narrow" on the very first page of their merits brief. Pet. Br. 1. Petitioners also suggest that Section 1442(a)(1) should be strictly construed. *Id.* at 30 (citing *Screws* v. *United States*, 325 U.S. 91 (1945)). The plurality in *Screws*, however, addressed the removal of state criminal prosecutions, an "'exceptional' procedure" (325 U.S. at 111) that represents a significantly greater infringement on state sovereignty than an ordinary civil removal. Whatever concerns this Court may have about broadly construing Section 1442(a)(1) in the criminal setting, those concerns are wholly inapposite in this civil action. *See Willingham*, 395 U.S. at 409 & n.4 (distinguishing between civil and criminal cases with respect to the jurisdictional showing necessary to remove under Section 1442(a)(1)). Indeed, although Congress has provided only very limited means of removing criminal

The broad construction historically afforded the removal statute reflects the reality that "[t]he legislation of a State may be unfriendly. It may affix penalties to acts done under the immediate direction of the national government, and in obedience to its laws." *Tennessee* v. *Davis*, 100 U.S. 257, 263 (1880). "For this very basic reason, the right of removal under § 1442(a)(1) is made absolute whenever a suit in a state court is for any act 'under color' of federal office, regardless of whether the suit could originally have been brought in a federal court." *Willingham*, 395 U.S. at 406; *see also Mesa* v. *California*, 489 U.S. 121, 136 (1989) (Section 1442(a)(1) "serves to overcome the 'well-pleaded complaint' rule which would otherwise preclude removal even if a federal defense were alleged").

THE UNDISPUTED FACTS ESTABLISH THAT THE REMOVAL REQUIREMENTS OF 28 U.S.C. § 1442(A)(1) ARE SATISFIED

To remove a case under 28 U.S.C. § 1442(a)(1), a private person must adequately allege in its notice of removal that (A) it was "acting under" a federal officer, (B) the suit is "for an[] act under color of such office," and (C) the removing party has a colorable federal defense. U.S. Br. 2. A court may exercise removal jurisdiction if the removing defendant is able to meet the requirements of Section 1442(a)(1) as to *any* of the plaintiffs' claims. *Cf. Exxon Mobil Corp.* v. *Allapattah Servs., Inc.*, 545 U.S. 546, 560 (2005).

Thus, the central question in this case is whether "the facts disclosed by the . . . petition for removal bring the defendants within" the federal officer removal statute. *Mary-*

[Footnote continued from previous page]

prosecutions to federal court, it has repeatedly enacted legislation in recent years expanding defendants' right to remove state-law civil actions to federal court. *See, e.g.*, Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4; Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227.

land v. *Soper (No. 1)*, 270 U.S. 9, 32 (1926). In answering that question, the Court "credit[s] the [removing defendant's] theory of the case." *Jefferson County* v. *Acker*, 527 U.S. 423, 432 (1999); *see also Willingham*, 395 U.S. at 407 ("The officer need not win his case before he can have it removed"). Where, as here, the removing defendant's factual averments stand undisputed, "no determination of fact is required, but it must fairly appear from the showing made [in the removal petition] that [the] claim is not without foundation and is made in good faith." *Symes*, 286 U.S. at 519; *see also Soper (No. 1)*, 270 U.S. at 33-34.[7]

Here, the undisputed facts set forth in PMUSA's Notice of Removal establish the prerequisites to removal under Section 1442(a)(1). Petitioners' complaint is, at its core, a direct attack upon the official tar and nicotine testing program that the FTC delegated to PMUSA and upon PMUSA's compelled disclosure of (and reliance on) those testing results. Petitioners allege that PMUSA's use of descriptors based on FTC Method results in its advertising is deceptive because consumers of Marlboro Lights and Cambridge Lights "receive higher levels of tar and nicotine than the [FTC-

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[7] Where a case is removable on the basis of a federal defense, the courts look to the removal papers to establish the bases of federal jurisdiction. *Franchise Tax Bd.* v. *Constr. Laborers Vacation Trust*, 463 U.S. 1, 11 n.9 (1983) (citing *R.R. Co.* v. *Mississippi*, 102 U.S. 135, 140 (1880), and *Gold-Washing & Water Co.* v. *Keyes*, 96 U.S. 199, 203-04 (1878)). The modern removal statute requires only "a notice of removal . . . containing a short and plain statement of the grounds for removal." 28 U.S.C. § 1446(a). The "short and plain statement" standard is identical to the one applicable to complaints filed in federal court, *see* Fed. R. Civ. P. 8(a), and the standards should therefore be construed equivalently. *Taylor* v. *United States*, 495 U.S. 575, 597 (1990). Thus, a case removed under Section 1442(a)(1) can be remanded "only if it is clear" that jurisdiction is lacking "under any set of facts that could be proved consistent with the allegations" in the notice of removal. *Swierkiewicz* v. *Sorema N.A.*, 534 U.S. 506, 514 (2002) (construing Rule 8) (internal quotation marks omitted).

required] testing apparatus registers" and because PMUSA purportedly "designed Cambridge Lights and Marlboro Lights to register lower levels of tar and nicotine on the . . . testing apparatus . . . than would be delivered to the consumers of the product." Pet. App. 63a-64a. As detailed in the Notice of Removal, the tar and nicotine testing results on which PMUSA bases its use of descriptors are generated while PMUSA is acting under the FTC because the FTC has delegated its official testing responsibility to PMUSA and has designated the FTC Method as the exclusive basis for any statement relating to tar and nicotine yields in advertising, including through the use of descriptors.

A. PMUSA Was "Acting Under" a Federal Officer In Testing And Disclosing Tar And Nicotine Yields

Since its earliest incarnation, the so-called "federal officer" removal statute has authorized removal not only by federal officers, but also by private parties acting at their direction or behest. Thus, the Customs Act of 1815 authorized removal by "any collector, naval officer, surveyor, inspector, or any other officer, civil or military, *or any other person aiding or assisting*, agreeable to the provisions of this act, or under colour thereof." Act of Feb. 4, 1815, ch. 31, § 8, 3 Stat. 198 (emphasis added); *see also* Act of Mar. 2, 1833, ch. 57, § 3, 4 Stat. 633 (authorizing removal by "any officer of the United States, *or other person*, for or on account of any act done under the revenue laws of the United States, or under colour thereof") (emphasis added); Act of Mar. 3, 1863, ch. 81, § 5, 12 Stat. 756 (authorizing removal by "any officer, civil or military, or . . . any other person" for acts "during the present rebellion, by virtue or under color of any authority derived from or exercised by or under the President of the United States, or any act of Congress"); Act of June 30, 1864, ch. 173, § 50, 13 Stat. 241 (extending the 1833 Act).

In 1866, Congress adopted the "acting under" formulation that appears in the current statute. The Revenue Act of 1866 authorized removal by "any officer of the United States, appointed under or acting by authority of [the revenue laws]," and "any person acting under or by authority of any such officer on account of any act done under color of his office." Act of July 13, 1866, ch. 184, § 67, 14 Stat. 171; *see also City of Greenwood* v. *Peacock*, 384 U.S. 808, 823 n.20 (1966) ("Although, in the revenue officer removal provision of the Revenue Act of 1866, Congress expressly characterized the 'other person' as one 'acting under or by authority of any [revenue] officer,' that statute obviously drew on the comparable characterization of the 'other person' in the Customs Act of 1815") (citations omitted). The Judicial Code of 1911 similarly authorized removal by "any officer appointed under or acting by authority of any revenue law of the United States" and "any person acting under or by authority of any such officer, on account of any act done under color of his office or of any such law." Act of Mar. 3, 1911, ch. 231, § 33, 36 Stat. 1097.

"Prior to 1948 the federal officer removal statute, as here relevant, was limited to revenue officers engaged in the enforcement of the criminal or revenue laws. The provision was expanded in 1948 to encompass *all* federal officers." *Peacock*, 384 U.S. at 820 n.17 (emphasis added); *see also* H.R. Rep. No. 308, 80th Cong., 1st Sess., A134 (1947). The 1948 enactment also "expressly expanded the right of removal to encompass . . . any person 'acting under' any such officer." U.S. Br. 14. The 1948 version of the statute authorized removal by "[a]ny officer of the United States or any agency thereof, or person acting under him, for any act under color of such office." 28 U.S.C. § 1442(a)(1) (1948).

Congress expanded the reach of the statute again in 1996 to encompass federal agencies (Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 206, 110 Stat. 3847, 3850), in response to this Court's conclusion that the prior

version did not apply to agencies. *See Int'l Primate Prot. League* v. *Adm'rs of Tulane Educ. Fund*, 500 U.S. 72, 76 (1991). In so doing, Congress explained that Section 1442(a)(1) provides a federal forum for "important and complex federal issues such as preemption." H.R. Rep. No. 798, 104th Cong., 2d Sess., at 20 (1996).

As relevant here, the current version of the statute authorizes removal by "[t]he United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office." 28 U.S.C. § 1442(a)(1); *see also Mesa*, 489 U.S. at 134 ("the specialized grants of jurisdiction in the last clause of subsection (1) concerning the apprehension of criminals and the collection of revenue and subsections (2)-(4) of § 1442(a) are largely the 'residue' of the pre-1948, more limited removal statutes now entirely encompassed by the general removal provision of the first clause of subsection (1)").

Although the predecessors to the modern statute were enacted "during times of discord between States and the federal government" (Pet. Br. 1), since 1948 the statute has applied to *all* federal officers, and *all* persons acting under such officers, without regard to any such "discord." *Mesa*, 489 U.S. at 126. Congress has determined that the very possibility of state disregard of federal prerogatives is sufficient reason to invest the federal courts with jurisdiction to hear cases involving the implementation of a federal program by public or private actors. *Willingham*, 395 U.S. at 406. The statute thus allows federal officers and agencies, and private persons acting under them, to litigate their federal defenses in federal court.[8]

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[8] The Solicitor General acknowledges that "the text and genesis of the statute" indicate that "private persons" may remove under it (U.S. Br. 15), and petitioners made a similar concession below (Pet. App. 35a). One group of *amici* supporting petitioners, however, contends that *corpo-*

1. PMUSA Assists The FTC In The Performance Of Its Official Duties

Petitioners and the Solicitor General contend that a person is "acting under" a federal officer within the meaning of Section 1442(a)(1) only when that person is assisting or acting on behalf of a federal officer in the performance of the officer's official duties. Pet. Br. 14; *see also* U.S. Br. 10 ("A private person acts under a federal officer within the meaning of the federal officer removal statute only when that person acts on behalf or otherwise assists the officer in carrying out the officer's official duties"). According to petitioners, removal is appropriate where "federal control and oversight . . . is substantial and the tasks being performed are those that the government might otherwise perform itself." Pet. Br. 32-33.

Removal is authorized here even under the unduly restrictive standard advocated by petitioners and the Solicitor General. Under stringent FTC "control and oversight," the industry-operated Tobacco Institute Testing Laboratory per-

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rations are not "persons" within the meaning of Section 1442(a)(1). Br. for Public Citizen, Inc. et al. 6. This argument was not raised by petitioners, and thus need not be considered by this Court. *United Parcel Serv., Inc.* v. *Mitchell*, 451 U.S. 56, 60 n.2 (1981). It is, in all events, meritless: The Dictionary Act makes clear that the term "person," unless the context requires otherwise, includes corporations. *See* 1 U.S.C. § 1. Nothing in the context of Section 1442(a)(1) requires otherwise. Contrary to *amici*'s contention (Br. for Public Citizen, Inc. et al. 10), it is hardly incongruous for the term "person" to include private corporations but not agencies. This Court has frequently given the term precisely that construction in other contexts. *See, e.g., Vt. Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 782 (2000). Moreover, *amici*'s reading would preclude many removals—for example, by government contractors—that petitioners and the government concede are appropriate. *See, e.g.*, Pet. Br. 33; U.S. Br. 25. Indeed, it would make little sense for Congress to authorize the employee of a corporation acting under a federal officer to remove, but not the corporation itself.

forms tar and nicotine testing that the FTC had "perform[ed] itself" for twenty years. When the FTC closed its own testing laboratory, it delegated its official testing responsibilities to PMUSA and the other major tobacco companies, which, under the auspices of the TITL, conduct tar and nicotine testing on the FTC's behalf. The FTC obtains the results of that testing from the tobacco companies and disseminates them in official government publications. In this manner, PMUSA assists the FTC and its officials in the performance of their statutory duties.

a. A Person Acts Under A Federal Officer When Assisting The Officer

This Court has already determined that the "acting under" requirement of Section 1442(a)(1) is at least broad enough to encompass—although not necessarily restricted to—persons who "assist" a federal officer in the discharge of his official duties.

In *Davis* v. *South Carolina*, 107 U.S. 597 (1883), the Court held that an individual who shot a suspect while assisting a U.S. marshal in making an arrest was entitled to remove a state criminal prosecution to federal court under the Revenue Act of 1866, which authorized removal by any "'officer appointed under or acting by authority of any revenue law of the United States, or any person acting under or by authority of such officer.'" *Id.* at 600. The Court explained that "the protection which the [removal] law thus furnishes to the [officer], also shields all who lawfully assist him in the performance of his official duty." *Ibid.*

Similarly, in *Soper (No. 1)*, the Court concluded that a chauffeur who drove federal prohibition agents during a raid on an illegal distillery possessed removal rights under the then-extant version of the federal officer removal statute that were identical to those of the agents themselves: As a "helper to the four officers," the Court explained, the chauffeur had the "same right to the benefit of [the removal stat-

ute] as [the officers]." 270 U.S. at 30. (The Court ultimately denied removal to all of the defendants due to the absence of the requisite causal nexus between the challenged conduct and the defendants' official activities. *Id.* at 34.)

The history of the federal officer removal statute, and this Court's interpretation of it, therefore establish that private persons may remove an action to federal court if they were "aiding or assisting" the federal officer (Customs Act of 1815); "lawfully assist[ing] him in the performance of his official duty" (*Davis* v. *South Carolina*, 107 U.S. at 600); or simply "help[ing]" a federal officer (*Soper (No. 1)*, 270 U.S. at 30). These decisions do not hold that the "acting under" provision of Section 1442(a)(1) is *limited* to defendants who are aiding or assisting a federal officer in the discharge of official duties. They do establish, though, that the provision of aid or assistance is *sufficient* to meet the "acting under" requirement of Section 1442(a)(1). Here, it is undeniable that PMUSA assists the FTC in its tar and nicotine testing program.

b. PMUSA Assists The FTC When Conducting Tar And Nicotine Testing

PMUSA is "acting under" a federal officer because it operates the TITL facility, which—subject to extensive FTC oversight—performs the delegated tar and nicotine testing responsibilities that the FTC itself carried out for two decades. PMUSA thereby aids, assists, and helps the FTC and its officers to carry out governmental functions.

The FTC opened its cigarette testing facility in 1967 in order to provide consumers with standardized tar and nicotine ratings and to encourage the development of lower tar and nicotine cigarettes. The FTC adopted the FTC Method as the sole testing methodology for use at its laboratory because it is the FTC's position that "the public interest requires that all test results presented to the public be based on a uniform method." J.A. 53. "[T]he purpose of testing," the

FTC explained, was "to determine the amount of tar and nicotine generated when a cigarette is smoked by machine in accordance with the prescribed method" (*id.* at 54) and thus to generate test results "based on a reasonable standardized method . . . capable of being presented to the public in a manner that is readily understandable" (*id.* at 53).

As the former deputy director of the FTC's Bureau of Consumer Protection has explained, "the Commission's operation of a testing system for the industry at taxpayer expense was highly unusual." J.A. 85-86. The FTC took this unprecedented step in order to "provide legitimate comparative information to consumers attempting to lower their overall tar and nicotine consumption." Resp. C.A. App. 392.

When cost considerations forced the FTC to close its cigarette testing laboratory, it delegated testing responsibility to the industry-operated TITL, which conducts testing in accordance with the requirements of the FTC Method. The FTC has unrestricted access to the laboratory and closely monitors its testing procedures to ensure that the FTC Method is being accurately followed. *See* J.A. 86 ("TITL's work is regularly monitored by the Commission's contractor, . . . who has virtually unrestricted access to the laboratory and makes unannounced visits to inspect it and check the testing process"); *see also* Resp. C.A. App. 652. The FTC obtains the TITL's testing results from the individual tobacco companies and continues to publish the results in the *Federal Register* and to disclose them to Congress, as it did the results of its own laboratory testing. Pursuant to the 1970 industry agreement on tar and nicotine disclosures, these results are included in the major tobacco companies' cigarette advertising.

Just as the soldier in *Davis* was "assist[ing]" the U.S. marshal in discharging his responsibilities under the federal revenue laws and the chauffeur in *Soper* was "help[ing]" the prohibition agents perform their official duties under the pro-

hibition laws, PMUSA was delegated and is assisting the FTC in discharging its official responsibility under the FTCA to test and disclose the tar and nicotine yields of cigarettes. As an historical matter, PMUSA's delegated responsibility for testing cigarettes' tar and nicotine yields is no different from a private individual's delegated responsibility to examine imported goods to determine whether they had been shipped from England in violation of the Customs Act of 1815. Just as that private individual was "aiding or assisting" the customs officials who had previously undertaken that examination as part of their official duties, PMUSA is "aiding or assisting" the FTC, which previously performed tar and nicotine testing itself pursuant to its responsibilities under the FTCA.

PMUSA's right to remove under Section 1442(a)(1) follows from the undisputed fact that the FTC itself conducted tar and nicotine testing for twenty years, before delegating that responsibility to PMUSA and the other tobacco companies, which now perform that official function on the FTC's behalf. *See* U.S. Br. 27 (arguing that federal contractors are entitled to remove under Section 1442(a)(1) because "they perform tasks that the government would otherwise have to perform itself through its own employees"). As petitioners themselves recognize, "[t]o 'act under' means to act as a subordinate or agent of another, subject to the other's control or supervision in exercising the other's authority." Pet. Br. 12; *see also* U.S. Br. 11 ("'under' is commonly used to describe a person or entity in a subordinate position who acts on behalf of or otherwise assists the person in the superior position to carry out the superior's duties"). That is precisely what PMUSA does when, subject to extensive FTC supervision, it tests cigarettes on behalf of the FTC. There is no suggestion that the FTC lacked authority to conduct the tests itself for twenty years, or to disclose the results of those tests to Congress and the public; when the FTC ordered the industry to instead perform the testing (under the FTC's control),

the identical conduct was no less authorized by federal law. And just as an FTC official could have removed a suit challenging the testing methodology and FTC-authorized descriptors, so too may PMUSA.

The Solicitor General nevertheless contends that PMUSA is "not producing a product or service that the government would otherwise be forced to produce for itself through its own employees." U.S. Br. 28. That assertion is flatly contradicted by the undisputed fact that PMUSA is providing both a service (tar and nicotine tests) and a product (the results of those tests, which are conveyed by the FTC to Congress and the public) that the government previously produced for itself through its own employees. Pet. App. 82a-83a. Thus, when it comes to testing cigarettes for tar and nicotine, PMUSA can hardly be said to be an "officious intermeddler." U.S. Br. 13. The testing method is prescribed by the FTC, the industry's laboratory is inspected by the FTC, and the results are reported by the FTC to Congress and the public. The FTC has, effectively, contracted out its testing obligations—the obligations it had shouldered itself for twenty years in the exercise of its official authority—to PMUSA and other industry participants.

The Solicitor General points to *Magnin* v. *Teledyne Continental Motors*, 91 F.3d 1424 (11th Cir. 1996), as an example of a case where removal under Section 1442(a)(1) was appropriate. U.S. Br. 26. There, a private individual was delegated authority to inspect aircraft by the Federal Aviation Administration. Here, PMUSA has been delegated authority to test cigarettes by the FTC. Thus, just as surely as an employee of the FTC's testing laboratory would have been able to invoke Section 1442(a)(1) to remove a suit challenging the FTC's methodology for testing cigarettes, PMUSA is authorized to remove this suit challenging the FTC Method, the TITL's testing results, and the corresponding descriptors be-

cause PMUSA has been delegated the FTC's testing responsibilities and is assisting and acting on behalf of the FTC.[9]

Based on the undisputed averments of its Notice of Removal, PMUSA has therefore established that, under the standard advocated by petitioners and the Solicitor General, it is "acting under" the FTC for purposes of Section 1442(a)(1).

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[9] In *Dixson* v. *United States*, 465 U.S. 482 (1984), the Court held that officers of a private, nonprofit corporation that administered a federal community development block grant were "public officials" for purposes of the federal bribery statute, 18 U.S.C. § 201(a), because they were "acting for or on behalf of the United States" within the meaning of the statute. The defendants had been delegated the official role of administering a social service program established by Congress, subject to federal guidelines governing distribution of the funds, and the Court concluded that they were "acting for or on behalf of the United States" in implementing that program. *Dixson*, 465 U.S. at 497. Like the defendants in *Dixson*, PMUSA—through its operation of the TITL—is "acting . . . on behalf of the United States" by performing official testing responsibilities delegated to it by the federal government. *See Peterson* v. *Blue Cross/Blue Shield of Tex.*, 508 F.2d 55, 57 (5th Cir. 1975) (holding that a corporation delegated official responsibility for administering aspects of the Medicare program was entitled to remove under Section 1442(a)(1)). Contrary to petitioners' intimation (Pet. Br. 14), there is no inconsistency in PMUSA's argument that, on the one hand, it is "acting under" a federal officer in its acts of testing and disclosing the tar and nicotine yields of cigarettes, but that, on the other hand, it is a private company whose operations in general are its own and not the government's. *See Brown* v. *Philip Morris Inc.*, 250 F.3d 789, 800 (3d Cir. 2001) (rejecting a *Bivens* action against the tobacco companies because they could not be considered federal actors). That a private party may carry a federal mantle for some purposes does not mean that such an entity is coextensive with the government for all purposes, including the constitutional constraints on government actors.

2. Alternatively, PMUSA Is Subject To The FTC's Direction And Control

This Court has never established a definitive standard for determining whether a private party is "acting under" a federal officer for purposes of Section 1442(a)(1). Although the Court's precedents indicate that aiding or assisting a federal officer is *sufficient* to satisfy the "acting under" standard, they do not establish that the provision of aid or assistance is *necessary* to meet that requirement. Indeed, this Court has never decided a case in which it has held that a private party failed to meet the "acting under" standard, and thus the outer bounds of that requirement have not been defined.

This Court has recognized that the federal officer removal statute has particular application where state law "affix[es] penalties to acts done under the *immediate direction* of the national government, and in obedience to its laws." *Tennessee* v. *Davis*, 100 U.S. at 263 (emphasis added). In this case, petitioners seek state-law "penalties"—compensatory and punitive damages—for "acts done" by PMUSA "under the immediate direction of the national government"—the testing and disclosure of tar and nicotine yields—"in obedience to its laws"—the FTCA and FCLAA.

Accordingly, in addition to being entitled to removal under the "assisting" standard endorsed by petitioners and the Solicitor General, PMUSA is authorized to remove this case under the standard applied by the court of appeals because it was acting under the FTC's direction and control when carrying out the tar and nicotine testing program and when using FTC-approved descriptors that correspond to those testing results.

a. A Person Acts Under A Federal Officer When Subject To The Officer's Direction And Control

As *Tennessee* v. *Davis* indicates, the "acting under" requirement can be met where a private party acts at the direc-

tion of a federal officer. Indeed, the plain meaning of the phrase "acting under" is to act "'subject to the authority, direction, or supervision'" of another. Pet. Br. 12 (quoting RANDOM HOUSE UNABRIDGED DICTIONARY 2059 (2d ed. 1993)). It was thus no accident that the Court in *Soper (No. 1)* noted that the chauffeur was employed "under [the officers'] order and *by direction* of [a superior officer]." 270 U.S. at 30 (emphasis added).

Petitioners, however, suggest that the private individual acting under a federal officer must not only be subject to the officer's direction and control but also must be subject to that control "in exercising the [federal officer's] authority." Pet. Br. 12. This gloss on the plain meaning of "acting under" has no support in the statutory text. A private company is just as much "acting under" a federal officer when that officer compels the company to take, or refrain from, certain action—for example, by prescribing the circumstances under which the company can include specific language in its advertising—as when the federal officer requires the private individual to perform a portion of its own official responsibilities. As petitioners' own dictionaries state, to act under someone means to act "'subject to the bidding or authority of'" that person (Pet. Br. 12 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2487 (2002))), and there is simply no basis for reading into those two words an additional requirement that the person acting under a federal officer discharge the officer's official responsibilities. *See also* U.S. Br. 11 ("In ordinary parlance, the term 'under' indicates, *inter alia*, 'subjection, guidance, or control'") (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 2765 (2d ed. 1958)).

To support their strained attempt to insert an "official authority" requirement into the "acting under" clause, petitioners point to the provision of Section 1442(a)(1) limiting removal to "any act under color of . . . office," which petitioners contend "evinces Congress's expectation that a removing

party . . . will have some claim to have been acting in an official capacity in carrying out public functions." Pet. Br. 13. But this Court has already defined the "act[ing] under color of . . . office" requirement in Section 1442(a)(1) as requiring "a showing of a 'causal connection' between the charged conduct and asserted official authority." *Willingham*, 395 U.S. at 409. The "color of . . . office" requirement therefore separates the conduct that a federal officer performs as a result of his official position (which entitles him to removal) from conduct unrelated to that position (which does not entitle him to removal).

Where a private person is "acting under" a federal officer, the "color of . . . office" requirement similarly distinguishes between conduct the person undertakes at the direction or behest of the federal officer (which is a basis for removal) from independent activities that are unrelated to the federal officer's directions (which do not constitute a basis for removal). Thus, although PMUSA is "acting under" the FTC at least some of the time, it is only entitled to remove those suits that challenge activities undertaken in the course of "acting under" the FTC. The "color of . . . office" requirement establishes the subject-matter constraints on the cases that federal officers and those acting under federal officers can remove to federal court. It does not, as petitioners suggest, superimpose an "official authority" requirement on the "acting under" clause.[10]

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[10] In light of this Court's explicit and unambiguous construction of the "color of . . . office" requirement in *Willingham*, petitioners' attempt to analogize that phrase to the "color of law" requirement of 42 U.S.C. § 1983 (Pet. Br. 13-14) is specious. Whatever the definition of that dissimilar statutory language found in a dissimilar statutory provision, it does not undermine this Court's determination that, as used in Section 1442(a)(1), the "color of . . . office" requirement denotes a "causal nexus" between the conduct in question and the federal officer's direction or control of the person "acting under" his authority. *Willingham*, 395 U.S. at 409; *Soper (No. 1)*, 270 U.S. at 33.

Moreover, petitioners' radical assertion that a "private commercial actor . . . cannot sensibly be said to act 'under color of [federal] office'" (Pet. Br. 9 (brackets in original)) would foreclose removal to federal contractors ("private commercial actor[s]") that assist federal officers in performing their duties or act at the express direction of federal officers. The lower courts have uniformly held that such contractors are entitled to removal under Section 1442(a)(1). *See* Br. of Defense Contractors et al. 7 n.6 (citing cases). The Solicitor General largely agrees. *See* U.S. Br. 25. And if those contractors may remove, then the "commercial" nature of PMUSA's business cannot, in itself, be any barrier to removal. *See also infra* at 38.

Petitioners also make the blanket assertion that "a private regulated party sued for conduct undertaken while acting in compliance with federal regulation" is not entitled to removal under Section 1442(a)(1). Pet. Br. 17. That is obviously incorrect. Such a party might, or might not, be "acting under" a federal official—the mere fact that a party is regulated cannot *exclude* it from the class of "persons" eligible to remove under Section 1442(a)(1). Indeed, when amending Section 1442(a)(1) in 1996, Congress expressly recognized that the statute provides a federal forum for "important and complex federal issues *such as preemption.*" H.R. Rep. No. 798, 104th Cong., 2d Sess., at 20 (1996); *see also* 142 Cong. Rec. S6517, S6519 (June 19, 1996) (statement of Sen. Grassley). Because preemption is not generally invoked as a defense by the federal government or federal officials, this statement is a clear indication that Section 1442(a)(1) extends to private persons subject to federal regulation. Whether such a person is acting under federal direction will necessarily depend on the facts and circumstances of each case, as averred in the notice of removal.

b. PMUSA Is Subject To The FTC's Direction And Control In Testing And Disclosing Tar And Nicotine Yields

The court of appeals closely examined the allegations in PMUSA's Notice of Removal concerning the FTC's lengthy history of tobacco regulation. It also considered the extensive documentary record supporting those allegations, and concluded that the "record is filled with FTC announcements of its policy as well as communications between the FTC and the cigarette industry." Pet. App. 13a. Surveying the "unprecedented extent" to which the FTC involved itself with the tobacco industry and low-tar cigarettes, the court of appeals held that the FTC exercises "comprehensive, detailed regulation" over the industry's testing and marketing practices and that PMUSA was therefore "acting under" the FTC in connection with the conduct alleged in petitioners' complaint. *Id.* at 8a. This conclusion is amply supported by the undisputed factual allegations in PMUSA's Notice of Removal, which sets forth in detail the FTC's stringent control over PMUSA's testing and disclosure of tar and nicotine yields.

The FTC initially required PMUSA to stop disclosing tar and nicotine yields in its advertising (Pet. App. 79a), then authorized it to begin disclosing testing results substantiated by the FTC Method (*ibid.*), and finally compelled it to include those results in all advertisements (*id.* at 85a). This is exactly the type of "immediate direction [by] the national government" (*Tennessee* v. *Davis*, 100 U.S. at 263) that can support removal under Section 1442(a)(1). PMUSA conducts tar and nicotine testing of its cigarettes pursuant to a delegation of FTC authority and using a methodology prescribed by the FTC, and, under FTC compulsion, it discloses those testing results in its advertisements and limits its use of descriptors to statements substantiated by the FTC Method. In conforming to those FTC directives, PMUSA is—under the very definitions adopted by petitioners and the Solicitor

General—"acting under" a federal officer. *See* Pet. Br. 12 (defining "under" as "subject to the authority, direction, or supervision of") (internal quotation marks omitted); U.S. Br. 11 ("'under' indicates . . . '[s]ubject to the guidance and instruction of'") (brackets in original).

This conclusion is supported by cases, largely embraced by petitioners (Pet. Br. 32-33), in which the lower courts have upheld removal by government contractors subject to stringent federal oversight. In *Winters* v. *Diamond Shamrock Chemical Co.*, 149 F.3d 387 (5th Cir. 1998), for example, a case relied upon by the court of appeals below, the court held that manufacturers of the pesticide Agent Orange were authorized to remove a state-law products liability suit under Section 1442(a)(1) because the government provided "detailed specifications concerning the make-up, packaging, and delivery of Agent Orange, [and] the compulsion to provide the product to the government's specifications." *Id.* at 400. The level of government control over the Agent Orange producers is comparable to the government's control over PMUSA. Just as the government compels the manufacturers of Agent Orange to produce their pesticide in a specific manner and to utilize specific labeling, it requires PMUSA to test its cigarettes subject to detailed technical specifications and to disclose its cigarettes' tar and nicotine yields in advertisements.

The efforts of petitioners and the Solicitor General to concoct a revisionist history of the FTC's tobacco regulatory regime are clearly flawed. As an initial matter, in attempting to deny that the past fifty years of FTC tobacco regulation ever took place, petitioners and the Solicitor General disregard the averments in PMUSA's Notice of Removal, which were not disputed below by petitioners and are controlling for purposes of this Court's jurisdictional analysis. *See Virginia* v. *Paul*, 148 U.S. 107, 122 (1893); *Symes*, 286 U.S. at 515. Moreover, the arguments advanced by petitioners and the Solicitor General fail on their own terms.

Petitioners contend, for example, that PMUSA's disclosure of tar and nicotine yields in its advertisements does not occur under federal "direction or supervision" because the 1970 industry agreement requiring disclosure was entered into on an ostensibly "voluntary" basis. Pet. Br. 39. But as the court of appeals recognized, the "FTC effectively used its coercive power to cause the tobacco companies to enter the agreement" (Pet. App. 10a) and accepted that agreement only after the tobacco industry had modified its initial proposal to meet the FTC's specific requirements. If the FTC had not proposed a Trade Regulation Rule mandating the disclosure of tar and nicotine yields, the major tobacco companies would not have entered into the agreement, which was indisputably a byproduct of the FTC's proposed rulemaking. Indeed, just as a driver threatened by a police officer with the issuance of a parking ticket cannot be said to have moved his car voluntarily, PMUSA—threatened with the promulgation of a rule mandating tar and nicotine disclosures—cannot be said to have voluntarily assumed the burden of testing for and disclosing tar and nicotine yields.

Furthermore, the FTC has closely monitored the industry's compliance with the obligations imposed by the 1970 agreement, and has brought suit against tobacco companies that disclose testing results obtained through means other than the FTC Method prescribed by the agreement. *See, e.g.*, *FTC* v. *Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 43 (D.C. Cir. 1985) (holding that a tobacco company's advertising that included tar and nicotine yields measured through a test different than the FTC Method constituted a deceptive trade practice under Section 5 of the FTCA).[11] The ever-

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[11] Petitioners' reliance (Br. at 40) upon *Brown & Williamson* to support their assertion that the FTC has not compelled tobacco companies to disclose FTC Method results in their advertising is squarely refuted by the procedural posture of the case—a suit brought by the FTC for the specific purpose of preventing a tobacco company from disclosing tar and nico-

present threat of an enforcement action is a powerful means of compelling PMUSA to comply with the FTC's advertising requirements. *See* Pet. App. 11a ("The main difference between a formal rule and an agreement is that the FTC enforces the disclosure of the [FTC] Method's results by bringing an action against the company for deceptive advertising rather than directly enforcing a regulation").

Petitioners also make much of the fact that the FTC's regulation of the use of tar and nicotine descriptors supposedly has been accomplished through consent orders with other tobacco companies. In so arguing, however, petitioners disregard the FTC's 1967 policy statement, which unambiguously authorized the tobacco industry to make "statements or representations of or relating to tar and nicotine content of cigarettes where they are shown to be accurately and fully substantiated" by testing under the FTC Method. J.A. 15 (internal quotation marks omitted).

Moreover, as former FTC Chairman Daniel Oliver explained in congressional testimony, the FTC utilized consent orders, rather than rulemaking, in this area because they provided the most expeditious manner of regulating industry-

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[Footnote continued from previous page]

tine yields generated by means other than the FTC Method. The court of appeals determined that the FTC bore the burden of establishing that the tobacco company's advertising practices were deceptive because it had not promulgated its tar and nicotine disclosure requirements through a Trade Regulation Rule. 778 F.2d at 45. But this burden allocation does not alter the fact that the FTC possesses the authority—and in *Brown & Williamson* it exercised that authority—to bring enforcement actions against tobacco companies that fail to comply with the 1970 industry agreement. Petitioners' invocation (Br. at 41) of PMUSA's 2002 petition for FTC rulemaking is equally misplaced. In that petition, PMUSA acknowledged that the FTC "require[s] the use of the [FTC] Method" for measuring tar and nicotine yields (petition at 6), and merely asked the FTC to consider whether modifications to its existing regulatory regime were warranted in light of new scientific developments (*id.* at 5).

wide conduct. J.A. 115; *cf. NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 294 (1974) ("[A]djudicated cases may and do . . . serve as vehicles for the formulation of agency policies, which are applied and announced therein") (internal quotation marks omitted). The FTC "discovered," Chairman Oliver testified, "that rulemaking takes a very long time," and that "it is more efficient to bring a single case against the first offender in order to stop the practice before we go to rulemaking." J.A. 115. "In the case of the cigarette industry," the Chairman continued, "it is entirely reasonable to suppose that one action against one cigarette company would have an effect on all of them, and that you would not have to make a rule." *Id.* at 116-17.

Indeed, courts have repeatedly recognized that FTC consent orders have regulatory effects that extend well beyond the parties to the agreement. *See, e.g., Gen. Motors Corp.* v. *Abrams*, 897 F.2d 34, 39 (2d Cir. 1990) (holding that FTC consent orders can preempt state legislation); *Ford Motor Co.* v. *FTC*, 547 F.2d 954, 959-61 (6th Cir. 1976) (holding that the FTC must afford the same treatment to one competitor that it has allowed to another competitor in an earlier consent order). Petitioners' lengthy discussion (Br. at 45) of cases addressing the precedential value of FTC consent orders is thus entirely beside the point. Whether or not the consent orders into which the FTC entered with American Brands and the American Tobacco Company are considered binding precedent in third-party actions, they instruct the tobacco industry that the FTC considers the use of descriptors to be nondeceptive—and will not initiate enforcement proceedings regarding such marketing practices—as long as the descriptors are accompanied by tar and nicotine testing results under the FTC Method.

The Solicitor General further maintains that PMUSA is not required to market "light" cigarettes and that "it does so solely in furtherance of its own economic interest." U.S. Br. 27. But the Solicitor General is answering the wrong ques-

tion. PMUSA has not argued, and the courts below did not hold, that PMUSA was "acting under" the FTC in "marketing" its products. Rather, PMUSA has maintained, the courts below held, and the undisputed evidence establishes, that PMUSA *was* acting on the FTC's behalf when it tested the tar and nicotine yields of its cigarettes, and that PMUSA *was* acting at the direction of the FTC when it disclosed the results of those tests (including when using FTC-approved descriptors corresponding to the FTC Method results) to consumers. That is all that is required to meet the "threshold" requirement of Section 1442(a)(1) removal.[12]

3. The Parade Of Horribles Imagined By Petitioners And Their *Amici* Is Illusory

Whether this Court applies the "assisting" standard endorsed by petitioners and the Solicitor General, or a "direction and control" test similar to that applied by the court of appeals, the undisputed averments in the Notice of Removal establish that PMUSA was "acting under" a federal officer in its cigarette testing and in its dissemination of the testing results. Pursuant to the FTC's policy of providing the public with standardized information about cigarettes' tar and nicotine yields, PMUSA conducts testing previously performed—and delegated to it—by the FTC and, under legal compulsion, discloses the FTC Method results both to the FTC, which reprints them as official government data, and to con-

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[12] This Court should scrutinize the Solicitor General's contrary position, and his attempted recharacterization of the FTC's regulatory history, with particular care because the Justice Department is currently engaged in litigation with PMUSA and the other major cigarette manufacturers, where one of the principal issues is the extent to which the FTC regulated PMUSA's use of tar and nicotine descriptors. *See United States* v. *Philip Morris USA, Inc.*, 449 F. Supp. 2d 1 (D.D.C. 2006) (enjoining the use of "light" descriptors), *appeal docketed*, No. 06-5267 (D.C. Cir. Sept. 11, 2006) (stay granted pending appeal). Because of that ongoing litigation, the Solicitor General can hardly be characterized as a disinterested party in this case.

sumers. Because PMUSA is acting at the FTC's behest, and pursuant to its direction, a federal forum is warranted to "permit[] a trial ... free from local ... prejudice" (*Manypenny*, 451 U.S. at 242) toward the FTC's tobacco policies.

Both petitioners and the Solicitor General, however, devote a significant portion of their briefs to suggesting that authorizing PMUSA to remove this case would occasion a flood of removals under Section 1442(a)(1), crippling the federal courts and undermining state sovereignty. Pet. Br. 34-39; U.S. Br. 19-23. These assertions are decidedly overstated because the unique history of tobacco regulation sets PMUSA apart from participants in other regulated industries who, although perhaps closely regulated by the federal government, do not perform delegated federal responsibilities in the same manner that PMUSA and other tobacco companies do. *See* Pet. App. 18a (Gruender, J., concurring). Under the auspices of the TITL, PMUSA is carrying out a testing program that the FTC itself conducted for twenty years. Petitioners identify no other industry where private companies have been delegated a testing function that the government itself previously performed and are compelled to disclose the testing results to the government, which disseminates the industry-generated data in official government publications. *See* Br. of Public Citizen, Inc. et al. 20 ("it may have been 'unprecedented' *for the FTC* to involve itself in product testing as it did with cigarettes") (emphasis in original).

A narrow decision holding that this extraordinary testing procedure—in combination with the stringent oversight the FTC exercises over the tar and nicotine claims in tobacco advertising—affords PMUSA the ability to remove this case to federal court would not extend the same removal right to other regulated industries. No matter the degree of regulatory oversight, those industries would not be performing delegated federal responsibilities unless the private industry participants were conducting an official function on behalf of the federal government. Petitioners' discussion of the coal-

mining, motor vehicle, medical device, and pesticide industries is therefore completely beside the point (Pet. Br. 35) because petitioners do not suggest that private participants in any of those industries perform delegated official responsibilities previously conducted by the federal government (and, to the extent that isolated examples do exist in other industries, the prevalence of this phenomenon would be far too rare to foster the exponential growth in removal predicted by petitioners and the Solicitor General).

B. PETITIONERS' SUIT RELATES TO "ACT[S] UNDER COLOR OF . . . OFFICE"

In order to establish that a suit pertains to "act[s] under color of . . . office," a private party seeking to remove under Section 1442(a)(1) must demonstrate the existence of a "causal nexus" between the conduct that the plaintiff challenges and the official authority under which the party was acting. *See Willingham*, 395 U.S. at 409.

The causal nexus element of Section 1442(a)(1) is not at issue here. Petitioners declined to seek review of the court of appeals' holding that PMUSA has established a causal nexus between the conduct alleged in petitioners' complaint and the official authority under which PMUSA was acting—choosing instead to frame the question presented solely in terms of whether PMUSA was "acting under" a federal officer. *See* Pet. i. This Court, of course, does not ordinarily review questions not presented in the petition. *See Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *United States Philips Corp.*, 510 U.S. 27, 31 (1993). Nor do petitioners address the causal nexus element in their merits brief.

Were the Court nevertheless to reach the issue, it would have little difficulty concluding that PMUSA has satisfied the "causal nexus" requirement. Petitioners allege, for example, that "consumers receive higher levels of tar and nicotine than the testing apparatus registers" and that PMUSA was able to "control[] the tar and nicotine delivery of Cam-

bridge Lights and Marlboro Lights cigarettes under machine testing conditions apparently to achieve support for [its] representations that [its] ... cigarettes are 'light' and contain decreased tar and nicotine." Pet. App. 64a. Petitioners thus expressly challenge the FTC's decision to require the tobacco industry to use the FTC Method despite its inherent limitations. Indeed, it is impossible for petitioners to do otherwise: The FTC Method is the only authorized means for tobacco companies to provide tar and nicotine yield information to consumers (either numerically or as the basis for descriptors such as "lights"). By challenging PMUSA's descriptors, petitioners are necessarily challenging the underlying testing that PMUSA performs on behalf of and under the direction and control of the FTC. *See* Pet. App. 16a (petitioners "challenge the FTC's policy judgment that despite the failure of the [FTC] Method to take into account ventilation holes or channels, the test results should still be included in advertising").[13]

Petitioners' assault on FTC-approved descriptors is a direct attack upon the tobacco policy implemented by the relevant arm of the federal government for the past half century. Because petitioners' claims "directly implicate[] the enforcement and wisdom of the FTC's tobacco policies" (Pet. App. 15a), this suit creates the possibility that state-court judges and juries who disagree with those policies will hold PMUSA liable for conduct that the FTC has expressly authorized or mandated. As petitioners acknowledge, Section 1442(a)(1) "safeguard[s] against state judicial action that ... could interfere with the enforcement and operation of national laws." Pet. Br. 1; *see also* U.S. Br. 1 ("Permitting per-

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[13] The FTC is pursuing an ongoing inquiry into whether the FTC Method should be modified or abandoned. 62 Fed. Reg. 48,158 (Sept. 12, 1997). As part of that process, the FTC is evaluating the same methodological limitations in the testing procedure that petitioners raise in their complaint. *Id.* at 48,159.

sons who are properly viewed as acting under a federal officer to remove state law actions to federal court ensures that state courts will not interfere with the operations of the federal government"). That is precisely what could happen if this case were remanded for a state court to sit in judgment regarding the FTC's direction and control of the tobacco industry.

C. PMUSA HAS A COLORABLE FEDERAL DEFENSE

The court of appeals held (Pet. App. 17a), and petitioners did not dispute below and do not contest here, that PMUSA has a colorable preemption defense based either on the express preemption provision of FCLAA or on the conflict between petitioners' state-law consumer fraud claims and the FTC's policies regarding tar and nicotine testing and advertising. Indeed, a number of courts have held that state-law claims similar to petitioners' are preempted. *See, e.g.*, *Brown* v. *Brown & Williamson Tobacco Corp.*, ___ F.3d ___, 2007 WL 470406 (5th Cir. 2007) (holding that a virtually identical "lights" claim was preempted by FCLAA); *Good* v. *Altria Group, Inc.*, 436 F. Supp. 2d 132 (D. Me. 2006), *appeal docketed*, No. 06-1965 (1st Cir. June 23, 2006).

Petitioners note that PMUSA does not have a defense of "official immunity" available to it. *See* Pet. Br. 19. But as this Court has explained, "removal under 28 U.S.C. § 1442(a) must be predicated upon averment of *a* federal defense," *Mesa*, 489 U.S. at 139 (emphasis added), not any *particular* federal defense. It is sufficient that "a Federal question or a claim to a Federal right is raised in the case, and must be decided therein." *Tennessee* v. *Davis*, 100 U.S. at 262; *see also Mesa*, 489 U.S. at 136. Indeed, when amending Section 1442(a)(1) in 1996, Congress identified the adjudication of preemption defenses in federal court as one of the rationales for federal officer removal. *See* H.R. Rep. No. 798, 104th Cong., 2d Sess., at 20 (1996) (Section 1442(a)(1)

provides a federal forum for "important and complex federal issues such as preemption"); 142 Cong. Rec. S6517, S6519 (June 19, 1996) (statement of Sen. Grassley) (same). This Court has recognized that the same objectives that underpin the preemption doctrine—the prevention of state interference with federal policies (*Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941))—also animate federal officer removal, which "is required for the preservation of that supremacy which the Constitution gives to the general government by declaring that the Constitution and laws of the United States made in pursuance thereof . . . shall be the supreme laws of the land." *Tennessee* v. *Davis*, 100 U.S. at 266.

The merits of PMUSA's defense of preemption, of course, are for the district court to decide in the first instance. *See Acker*, 527 U.S. at 432 ("requiring a 'clearly sustainable defense' [at the removal stage] rather than a colorable defense would defeat the purpose of the removal statute"). This case comes to the Court on extensive undisputed facts, as set forth in the Notice of Removal. That those facts would establish a "colorable" defense of federal preemption cannot seriously be disputed, because other courts have held, on summary judgment, that similar facts are sufficient to sustain such a defense. *See, e.g.*, *Brown*, ___ F.3d ___, 2007 WL 470406. Indeed, PMUSA has moved for summary judgment on that ground in the district court. That motion has not yet been adjudicated, and thus the merits of the preemption defense are not before the Court in this case. The *only* question before the Court is whether the case was properly removed under 28 U.S.C. § 1442(a)(1).

* * *

The question petitioners have asked this Court to answer is "[w]hether a private actor doing no more than complying with federal regulation is a 'person acting under a federal officer' for the purpose of 28 U.S.C. § 1442(a)(1)." Pet. i. The answer to that question is: "It depends." In many cases, petitioners' question should be answered in the negative because

"mere" regulation does not satisfy the "acting under" requirement. But it cannot be that petitioners' question must also be answered in the negative if the relationship between the private actor and federal officials, as alleged in the notice of removal, establishes that the defendant assisted, or acted at the specific direction of, a federal officer. If that were the case, then private parties would be effectively excluded from the reach of the federal officer removal statute, contrary to the text, history, and structure of the statute, as well as this Court's precedents.

In this case, PMUSA is doing much more than merely "complying with federal regulation." As the court of appeals explained, "[t]hroughout the record, there [are] several indications that both developing a testing method and carrying out the testing evidenced an unusually high level of governmental participation and control." Pet. App. 13a; *see also ibid.* ("[t]he record establishes that [PMUSA] acted under the direction of a federal officer"). The sole question before the Court is whether that same record—the undisputed averments of the Notice of Removal and the evidence submitted in support thereof—shows that PMUSA was "acting under" a federal officer in testing and disclosing the tar and nicotine yields of its cigarettes, as the courts below held. *That* question, which is the only one properly before the Court, should be answered in the affirmative.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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